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No. 95-1507

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BENITO IADAROLA,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

VICTOR IADAROLA,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: April 18, 1996

QUESTIONS PRESENTED

1. Whether this Court should grant *certiorari* to review the petitioners' claim that the state trial court violated their federal constitutional rights by failing to submit a certain defense to the jury, even though that claim does not raise a substantial federal question, that claim was not decided by the state courts, that claim does not raise an important issue of constitutional law, and that claim is utterly meritless, given the facts of this case.

2. Whether this Court should grant *certiorari* to review the petitioner's claim that the trial court's intent charge was constitutionally inadequate, even though that claim does not raise a substantial federal question, that claim was not decided by the state courts, that claim does not raise an important issue of constitutional law, and that claim is frivolous.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

The State of New York requests that this Court deny the petition for a writ of *certiorari* brought by the petitioners, Victor and Benito Iadarola. The petitioners seek review of orders of the New York Supreme Court, Appellate Division, Second Department, unanimously affirming their convictions

for the crime of Enterprise Corruption (N.Y. Penal Law § 460.20 [McKinney 1989]).

OPINIONS BELOW

The opinions of the New York Supreme Court, Appellate Division, Second Department, in *People v. Benito Iadarola* and *People v. Victor Iadarola* are each reported at 634 N.Y.S.2d 738 (2d Dep't 1995) and are reprinted in the petitioners' appendix at 5a and 7a.

JURISDICTIONAL STATEMENT

The New York Court of Appeals entered its orders, denying the petitioners' application for permission to appeal, on December 20, 1995. The petitioners filed their petition for *certiorari* in this Court on March 19, 1996, which is within the statutory time period. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> [N]or [shall any person] be deprived of life, liberty, or property without due process of law . . . .

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

United States Constitution, Fourteenth Amendment

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The Trial

The People's Case

On November 1, 1988, Sergeant Ronald Rose and a team of detectives from the Brooklyn North Public Morals District commenced an investigation into an illegal gambling operation at 320 Lafayette Street in Brooklyn, New York. This investigation eventually led to the discovery of a large, well-organized, and vastly profitable illegal gambling business operating in Brooklyn.

The business was run by petitioner Victor Iadarola and codefendant Hali Polanco. Victor Iadarola's brother, petitioner Benito Iadarola, was Victor's chief assistant. The Iadarolas participated in or directed illegal gambling activities at more than fifty locations throughout Brooklyn. The enterprise controlled its gambling spots in one of three ways: the enterprise would be fully responsible for operating the spot, providing personnel and equipment for the operation, including betting slips, telephones, facsimile machines, and tape recorders; or, the enterprise would pay rent for a storefront location such as a bodega, reaping a percentage of the spot's earnings from the store owner; or, the enterprise would require a storefront owner who wished to conduct policy gambling within his store to pay "protection money," a fee extorted from the store owner to ensure that the store would not be jeopardized by acts of violence perpetrated by organized crime.

So profitable was the enterprise that the petitioners would forego control of any gambling spot that did not realize weekly receipts of at least $5,000 to $7,000. It is estimated, conservatively, that during a two and one-half year period from February 1, 1989 to July 12, 1991, the enterprise realized total receipts in excess of eighteen million dollars.

In telephone conversations that were electronically recorded, petitioner Victor Iadarola acknowledged his criminal activity and expressed his fear that he would be sent to jail for his crimes. For example, in a telephone conversation with his daughter Annemarie Iadarola on October 13, 1989, Victor complained that the Federal Bureau of Investigation (hereinafter "F.B.I.") was following him. When Annemarie asked why, Victor responded, "Annemarie, I'm not selling bibles, am I" (Call number 1803). During a telephone conversation with his wife Rose on November 3, 1989, Victor said, "I got the F.B.I. on me all fucking day," and "I'm going to jail" (Call number 4354). During a telephone conversation with Special Agent Richard Leahy of the F.B.I. on June 4, 1990, Victor stated, "Yeah, well, I'm a hood myself . . . . let's stop kidding ourselves. I made money too, understand?" (Call number 727).

The Defense Case

The petitioners called Special Agent RICHARD LEAHY and Special Agent GARY DRAUS of the F.B.I. to testify in their behalf. The agents stated that, in 1981, the petitioners began providing information to the F.B.I. as confidential informants (Draus: V.5023-24; Leahy: VI.5331, 5364, 5430-31, 5435-36, 5465).[1] Two years later, in 1983, the F.B.I. discontinued the petitioners as confidential informants (Draus: V.5205, VI.5307-09; Leahy: VI.5490-91, 5533-34).[2] The F.B.I. discontinued Victor Iadarola at his request and discontinued Benito Iadarola due to his lack of productivity (Draus: V.5205, VI.5307-09; Leahy: VI.5533-34, 5593-94).

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[1] The trial testimony is contained in volumes numbered I to VII. References to pages of the trial transcript appear in parentheses, preceded by the respective volume number of the transcript and name of the witness whose testimony is being cited.

[2] Contrary to the assertion in the petitioners' brief, the petitioners did not "remain[ ] confidential informants over a period of ten years" (Petitioners' Brief at 4).

Petitioner Victor Iadarola was reactivated as a confidential informant in 1986 and Benito Iadarola was reactivated as a confidential informant in 1988 (Draus: VI.5323; Leahy: VI.5374-75, 5492, 5535).

Over the years, in accordance with the United States Attorney General's guidelines for the conduct of informants, agents of the F.B.I. repeatedly advised the petitioners that they were not agents or employees of the F.B.I., that they were not to participate in any crimes, and if they did so, they were subject to criminal prosecution (Draus: V.5173-75, 5189-92, VI.5286-89; Leahy: VI.5471-76, 5478-79, 5598-99).

Indeed, while the petitioners were confidential informants for the F.B.I., they were prosecuted by the State. In May of 1981, the petitioners were indicted by the Kings County District Attorney's Office for possession of gambling records (Leahy: VI.5336-37, 5365, 5367, 5464, 5480). Special Agent Leahy told the District Attorney's Office that the Iadarolas were providing information to the F.B.I. and he asked for leniency for them on the gambling charges (Leahy: VI.5336-37, 5368, 5370, 5470, 5480-84). The District Attorney's Office recommended that each of the petitioners be permitted to plead guilty to a misdemeanor gambling charge in full satisfaction of the indictment (Leahy: VI.5484-85).[3]

Petitioner Benito Iadarola testified in his own behalf. He alleged that in February, 1981, Special Agent Leahy told him and his brother to "stay in the gambling business", and that in 1988, Special Agent Draus told him and his brother to "stay

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[3] Contrary to the assertion in the petitioners' brief, there is no evidence that the F.B.I. ever "supervised petitioners on behalf of the District Attorney" (Petitioners' Brief at 4). Indeed, while Agent Draus was handling the petitioners from 1988 to 1990, Agent Draus admitted that he tried to prevent the District Attorney's Office from learning that the Iadarolas were his informants (Draus: V.5061-62, 5065, 5105-07, 5111, 5119-20, 5152, 5199, 5202-03).

into the number game" (Iadarola: VI.5648-50).[4] However, he conceded that he was not engaged in public service (Iadarola VI.5653). In addition, he admitted that he had been involved in illegal gambling for some time before he became an informant for the F.B.I. (Iadarola: VI. 5651, 5654).

The Rebuttal Case

In rebuttal, the People introduced two telephone conversations which had been electronically recorded. On June 1, 1990, in a telephone conversation with a woman named Laura, petitioner Victor Iadarola said,

> A lot of lawyers and people are very ignorant, you know, they come up with these sneaky laws that they could come into your house, get a court order, search your house if you're doing gambling or anything like that, get all the records and anything that you've written on that's pertaining to gambling or anything, and lock you up. . . . With all the coke and this and that going on, they have to blame the, they have to put it on gambling something, you know? This is a new law, just read it in the paper again. They made a big raid in Queens, this, that, something. . . . Yeah, we, nobody knew. This law was in effect, I would've, ha, adios. But that's the way life goes.

(VII.5700; Call number 634).

On June 4, 1990, after receiving two telephone calls from Special Agent Leahy, Victor Iadarola told codefendant Hali Polanco that he had received a call from "our friend"—apparently referring to Leahy—and that "he's reaching. Understand?" Victor Iadarola added, "You know, I, every possible way that I could beat these motherfuckers, I'm trying. You

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[4] Contrary to the assertion in the petitioners' brief (Petitioners' Brief at 6), Benito Iadarola never testified that the F.B.I. "authorized" him to continue illegal activities.

know what I mean?" and "Look, it's bargain time, you understand?" (VII.5701; Call number 728).

The Court's Charge

During the trial, petitioner Victor Iadarola requested a special charge on intent. He asked the court to instruct the jury that "if a person engages in conduct which violates a criminal statute, with the reasonable belief that he or she is acting as an authorized agent to assist in law enforcement activity, then that person may not be convicted of violating the criminal statute because the required criminal intent is lacking" (Victor Iadarola's Appellate Division brief, Exhibit A). The trial court denied the request, concluding that the petitioners' alleged belief did not in any way negate their intent to commit the crimes charged (VI.5450, 5515-16).

However, the trial court did charge the jury on the justification defense set forth in New York Penal Law § 35.05(1). The court instructed the jury that conduct that would otherwise constitute an offense was justifiable and not criminal where such conduct is performed by a public servant in the reasonable exercise of his official powers, duties, or functions (Charge: VII.94). The trial court defined a public servant as any person exercising the function of a public officer or employee, even if the person was not "on the payroll of the particular agency" (Charge: VII.96).

The Verdict and Sentence

On May 17, 1994, the jury convicted each petitioner of one count of Enterprise Corruption (N.Y. Penal Law § 460.20 [McKinney 1989]). On July 6, 1995, the court sentenced petitioner Victor Iadarola to a prison term of three and one-third to ten years, and sentenced petitioner Benito Iadarola to a prison term of two to six years.

The State Appeal

The petitioners appealed to the New York Supreme Court, Appellate Division, Second Department (hereinafter "Appellate Division"). In his brief, petitioner Victor Iadarola claimed, *inter alia*, that the trial court had committed reversible error because the court refused to give the intent instruction that he had requested during trial. In his brief, petitioner Benito Iadarola claimed, *inter alia*, that the trial court had committed reversible error because the court did not charge the jury that the petitioners should be acquitted if they reasonably believed that they were authorized to engage in criminal activity in their roles as government informants.

The Appellate Division affirmed the petitioners' convictions. With respect to the intent claim raised by petitioner Victor Iadarola, the Appellate Division held:

> Contrary to the defendant's contention, the trial court properly denied the defendant's request to charge the jury that he lacked the intent to commit the crimes with which he was charged because, as a confidential informant, he had a reasonable belief that the Federal Bureau of Investigation (hereinafter the F.B.I.) had given him the authority to commit those crimes. There is no proof that the defendant did not intend to participate in the gambling enterprise with which he was charged. However, in view of the fact that the defendant presented evidence suggesting that he was an F.B.I. informant, the trial court properly instructed the jury that, if it found the defendant guilty of the crime of enterprise corruption, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise of his duties.

People v. Victor Iadarola, 634 N.Y.S.2d 738, 739 (2d Dep't 1995).

With respect to the "reasonable belief" defense raised by petitioner Benito Iadarola, the Appellate Division held:

> The defendant argues, similarly to his co-defendant (*see*, *People v. Victor Iadarola*, ___ A.D.2d ___, 634 N.Y.S.2d 738 [decided herewith]), that the trial court erred by failing to instruct the jury that he should be acquitted if he reasonably believed that the Federal Bureau of Investigation (hereinafter the F.B.I.) had authorized him to engage in criminal activities in connection with his role as a confidential informant. This defense, as set forth in *United States v. Abcasis*, 45 F.3d 39, has no basis in New York law. The trial court properly and adequately instructed the jury that, if it found the defendant guilty of the crimes with which he was charged, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise of his duties. In any event, no reasonable view of the evidence that was adduced at trial supports this defense.

People v. Benito Iadarola, 634 N.Y.S.2d 738 (2d Dep't 1995).

The petitioners applied, pursuant to New York Criminal Procedure Law §§ 460.10(5) and 460.20, for permission to appeal from the Appellate Division's decisions to the New York Court of Appeals. On December 20, 1995, Judge Howard A. Levine of the New York Court of Appeals denied their requests for permission to appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE PETITIONERS' JUSTIFICATION CLAIM IS BEYOND THE SCOPE OF THIS COURT'S REVIEW, DOES NOT RAISE AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW, AND LACKS MERIT.

The petitioners' application for a writ of *certiorari* should be denied. The petitioners claim that the state trial court erroneously failed to submit a defense.[5] However, this Court does not have jurisdiction to review this claim. Furthermore, this claim does not present an important issue of constitutional law. Moreover, this claim is utterly meritless. Therefore, this claim presents no reason for this Court to grant the petitioners further review.

First, the petitioners' application for a writ of *certiorari* should be denied because the petitioners' claim raises only a question of state law, not a question of federal constitutional law. In his direct appeal to the Appellate Division, petitioner Benito Iadarola argued that his conviction should be reversed because the trial court failed to charge the jury that the petitioners should be acquitted if the petitioners reasonably believed that the F.B.I. had authorized them to engage in criminal activities in connection with their role as confidential informants. The Appellate Division rejected this claim, observing that the suggested charge "has no basis in New York law." *People v. Benito Iadarola*, 634 N.Y.S.2d 738 (2d Dep't 1995). The Appellate Division noted that, instead, the trial court had correctly apprised the jury on the justification defense which is set forth in New York Penal Law § 35.05(1).

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[5] In their first point, the petitioners also contend that the trial court's intent charge was constitutionally defective (Petitioners' Brief at 11, 13). The petitioners' claim concerning the intent charge is discussed in Point II, *infra*.

The trial court instructed the jury that conduct that would otherwise constitute an offense is justifiable and not criminal where such conduct is performed by a public servant in the reasonable exercise of his official powers, duties or functions (Charge: VII.94). The trial court defined a public servant as any person exercising the function of a public officer or employee, even if the person was not "on the payroll of the particular agency" (Charge: VII.96).

The petitioners now claim that their rights under the Fifth, Sixth, and Fourteenth Amendments were violated by the trial court's failure to charge the jury on this "reasonable belief" defense. However, this claim presents no issue of constitutional law. The definition of state crimes and state defenses is ordinarily a matter of state law. *See Patterson v. New York*, 432 U.S. 197, 210 (1977). This rule should certainly apply to a defense of justification. As this Court has observed, "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas*, 392 U.S. 514, 536 (1968).

Obviously, this Court has the power to strike down criminal statutes which violate some specific provision of the Constitution. For example, this Court has struck down statutes which violate the First Amendment (*Texas v. Johnson*, 491 U.S. 397 [1989]); the Equal Protection Clause (*McLaughlin v. Florida*, 379 U.S. 184 [1964]); the Cruel and Unusual Punishment Clause (*Robinson v. California*, 370 U.S. 660 [1962]), and the constitutional right to privacy (*Griswold v. Connecticut*, 381 U.S. 479 [1965]). In addition, this Court has struck down criminal statutes which are so vague that they fail to give persons of ordinary intelligence fair notice of what is forbidden by the statutes. *Papachristou v. City of Jack-*

sonville, 405 U.S. 156 (1972). But the petitioners have never alleged that New York State's justification statute violates any of these precepts.

Moreover, while the due process clause imposes some outer boundaries on the conduct that a State can criminalize (*see Cox v. State of Louisiana*, 379 U.S. 559, 571 [1965]), the scope of the due process clause beyond those protections conferred by the Bill of Rights is quite limited. *See Dowling v. United States*, 493 U.S. 342, 352 (1990) ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation"). Here, where the petitioners were given a justification defense which was very similar to the defense the petitioners now raise,[6] the due process clause should have no application.

In sum, the petitioners urge this Court, in essence, to overrule the choices made by the New York State Legislature and redefine the substantive content of New York criminal law. Because the scope of the New York justification defense is a matter of New York state law, this case does not present a substantial federal constitutional issue for this Court to review.

Second, even if the petitioners' claim raised a substantial federal constitutional issue, the petitioners' claim cannot be reviewed in this case because the state courts never ruled on any federal constitutional issue. The Supreme Court has no jurisdiction to exercise its appellate power over state court judgments, unless a federal question has been decided in the state courts below. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Street v. New York*, 394 U.S. 576, 581-82 (1969); *see Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

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[6] In fact, at least one commentator has suggested that the justification defense set forth in New York Penal Law 35.05(1) may apply to a person who acts on a reasonable, but mistaken, belief that his or her behavior is legal. American Law Institute, Model Penal Code and Commentaries, Part I, § 3.03, pages 29-30, n.19 (1985).

When the highest state court "has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582.

In this case, the Appellate Division never addressed the question whether the trial court's failure to submit the defense violated the Fifth, Sixth, or Fourteenth Amendments of the Federal Constitution. Instead, the Appellate Division ruled only that the trial court properly did not submit the defense on the basis of state law. *People v. Benito Iadarola*, 634 N.Y.S.2d at 738.

The Appellate Division correctly refused to consider the petitioners' constitutional claim, because the claim was unpreserved for appellate review. Under New York law, in order to preserve a constitutional issue for appellate review, a criminal defendant must timely and specifically raise the constitutional claim in the trial court. *See* N.Y. Crim. Proc. Law § 470.05(2) (McKinney 1994); *People v. Udzinski*, 146 A.D.2d 245, 248-52, 541 N.Y.S.2d 9, 11-14 (2d Dep't 1989). In this case, the petitioners' counsel never alluded to any federal constitutional provision during their discussions about the court's charge. Thus, under New York law, the petitioners' constitutional claim was unpreserved. *See People v. Voliton*, 83 N.Y.2d 192, 195-96, 608 N.Y.S.2d 945, 947, 630 N.E.2d 641, 643 (1994) (court refused to consider defendant's due process claim, because defendant failed to raise claim in trial court); *People v. Qualls*, 55 N.Y.2d 733, 447 N.Y.S.2d 149, 431 N.E.2d 634 (1981) (court refused to review defendant's confrontation clause claim because defendant raised only evidentiary claim in trial court); *People v. Dozier*, 52 N.Y.2d 781, 436 N.Y.S.2d 620, 417 N.E.2d 1008 (1980) (court refused to consider constitutional issues that were not specifically raised in trial court).

Although the Appellate Division does have the discretion to review unpreserved claims in the interest of justice (*see* N.Y. Crim. Proc. Law § 470.15[6][a] [McKinney 1994]; *People v. Cona*, 49 N.Y.2d 26, 33, 424 N.Y.S.2d 146, 149, 399 N.E.2d 1167, 1169 [1979]), this power "is not invoked routinely." *Martinez v. Harris*, 675 F.2d 51, 54 (2d Cir.) (citation omitted), *cert. denied*, 459 U.S. 849 (1982). In light of the Appellate Division's silence on the petitioners' federal constitutional claim, this Court should conclude that the Appellate Division refused to review this claim because it was unpreserved. *See Coleman v. Thompson*, 501 U.S. at 732-40; *Epps v. Commissioner of Correctional Services*, 13 F.3d 615, 618-19 (2d Cir.), *cert. denied*, 114 S. Ct. 1409 (1994).

Third, the petitioners' application for a writ of *certiorari* should be rejected because this claim does not raise an important issue of law. As one of the petitioners' counsel observed during trial, the public servant justification defense set forth in Penal Law § 35.05(1) is rarely raised in New York (VI.101). In light of the extremely limited impact that a decision on this issue will have, this claim does not present a significant issue of constitutional law for this Court to resolve.

Fourth, this Court should not issue a petition for a writ of *certiorari* in this case because the petitioners' claim is meritless. New York State's failure to recognize a "reasonable belief" defense does not violate the federal constitution. On the contrary, the New York State Legislature reasonably chose not to recognize this defense. A "reasonable belief" defense "is an invitation to excess, encouraging officers to overstep the boundaries of their powers because it will be impossible, or very difficult, to show that their beliefs about limits (often very vague limits) were unreasonable." American Law Institute, Model Penal Code and Commentaries, Part I, § 3.03, page 30 (1985). Therefore, New York State was not constitutionally required to adopt such a defense.

In any event, the evidence introduced at trial did not support this defense. Special Agents Gary Draus and Richard Leahy testified that the petitioners were repeatedly informed, in accordance with the Attorney General's Guidelines, that the petitioners were not agents of the F.B.I., that they were not permitted to engage in any criminal activity, and that, if they did engage in criminal activity, they could be prosecuted (Draus: V.5173-75, 5189-92, VI.5286-89; Leahy: VI.5471-76, 5478-79, 5598-99). Although Benito Iadarola testified that Agents Draus and Leahy had told him to stay in the gambling business (Iadarola: VI.5648-50), he never disputed that he had been repeatedly warned over the course of years that he could face prosecution for his actions. Indeed, in 1981, the State prosecuted the petitioners for a gambling offense, despite the fact that they were F.B.I. informants at that time. Under these circumstances, no reasonable person could have believed that the petitioners had immunity to operate a multi-million dollar gambling operation in violation of the laws of the State of New York.

Furthermore, statements made by Victor Iadarola, which were recorded on audiotape, unequivocally established that the petitioners did not believe that they had permission from the F.B.I. to operate their gambling empire. In telephone conversations with family members and business associates, Victor Iadarola observed that he was "not selling bibles," said that he would have quit the gambling business earlier had he known about New York's enterprise corruption statute, and predicted that he was "going to jail" (Call numbers 1803, 4354, 634, 727). In a recorded conversation with Agent Leahy, Victor Iadarola admitted, "Yeah, well, I'm a hood myself . . . . let's stop kidding ourselves. I made money too, understand?" (Call number 727). In a conversation with codefendant Hali Polanco, Victor Iadarola said, "Look, it's bargain time, you understand?" (Call number 728). Obviously, had Victor Iadarola actually believed that he and his brother had permission to operate a gambling operation in New York, he

would have made none of these comments. Thus, as the Appellate Division held, no reasonable view of the evidence supported the petitioners' contention that they reasonably believed that they had been given permission by the F.B.I. to run a multi-million dollar gambling operation in New York.

For all of these reasons, petitioners' claim regarding the scope of New York State's justification defense does not provide any reason for this Court to issue a writ of *certiorari*. Therefore, this petition should be denied.

POINT II

THE PETITIONERS' CLAIM CONCERNING THE TRIAL COURT'S INTENT CHARGE IS BEYOND THE SCOPE OF THIS COURT'S REVIEW, DOES NOT RAISE AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW, AND LACKS MERIT.

This Court should also refuse to review the petitioners' related claim that the trial court's intent charge violated the petitioners' rights under the Fifth, Sixth, and Fourteenth Amendments. The petitioners contend that the trial court's intent charge was constitutionally insufficient because the trial court refused to give the following instruction: the jury should conclude that the petitioners lacked the intent to commit the crime charged if the petitioners reasonably believed that the Federal Bureau of Investigation had given them the authority to commit that crime. Like the petitioners' justification claim, the petitioners' intent claim is beyond the scope of this Court's jurisdiction, does not raise an important issue of law, and is substantively meritless.

The petitioners' claim is beyond the scope of this Court's review because the claim does not raise a federal constitutional question. The content of a state court's jury instructions is ordinarily a matter of state law. *United States ex rel. Smith*

v. Montanye, 505 F.2d 1355, 1359 (2d Cir. 1974), *cert. denied*, 423 U.S. 856 (1975); *see Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Because the petitioners' claim raises only an issue of state law, this Court does not have jurisdiction to review the claim. *See* 28 U.S.C. § 1257(a).

This claim is also beyond the scope of this Court's review because the state courts never ruled on any federal constitutional issue. *See supra*, at 12-14; *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Street v. New York*, 394 U.S. 576, 581-82 (1969). The Appellate Division never addressed the question of whether the trial court's refusal to give the requested intent instruction violated the petitioners' Fifth, Sixth, and Fourteenth Amendment rights. *People v. Victor Iadarola*, 634 N.Y.S.2d 738 (2d Dep't 1995).

As noted before, when the highest state court "has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582. Here, the record unequivocally shows that the petitioners failed to raise the issue properly in state court. When Victor Iadarola's counsel requested the instruction, he did not refer to any constitutional provision or otherwise alert the trial court to any federal constitutional issue. Therefore, under New York law, the petitioners' constitutional claim was not preserved for appellate review.[7] *See People v. Voliton*, 83 N.Y.2d 192, 195-96, 608 N.Y.S.2d 945, 947, 630 N.E.2d 641, 643 (1994); *People v. Qualls*, 55 N.Y.2d 733, 447 N.Y.S.2d 149, 431 N.E.2d 634 (1981); *People v. Dozier*, 52 N.Y.2d 781, 436 N.Y.S.2d 620, 417 N.E.2d 1008 (1980). Because there is

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[7] Although Victor Iadarola's counsel cited to *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) in support of his charge request, this citation was not sufficient to alert the trial to any constitutional issue. *United States v. Barker* addresses only the scope of the mistake of law and mistake of fact defenses under federal law.

an independent and adequate state ground for the Appellate Division's failure to consider the petitioners' constitutional claim, this claim cannot be reviewed by this Court. *See Coleman v. Thompson*, 501 U.S. 722, 729, 737-40 (1991).

Furthermore, the petitioners' claim does not raise an important issue of law for this Court to review. Insofar as respondent is aware, there are no other federal or state cases which address whether the proposed intent charge is constitutionally required. Indeed, since the proposed charge is based on the extremely unusual facts of this case, it is unlikely that this issue has ever arisen before. Consequently, this case does not present a significant question of law for this Court to resolve.

Finally, the petitioners' application for a writ of *certiorari* on the basis of this claim should be rejected because the petitioners' claim is specious. Before a federal court may overturn a conviction based on a state trial court's charge, it must be established that the absence of the requested instruction is not only "undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. at 146; *see Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977).

Here, the trial court properly refused to give the requested instruction, because that instruction was incorrect as a matter of law and logic. The petitioners' proposed charge would have instructed the jury that, if the jury accepted the petitioners' claim that the F.B.I. had authorized them to commit the crime, the jury must conclude that the evidence was insufficient to establish their intent to commit the crime. However, this instruction was completely wrong. The petitioners' alleged belief in their own authorization had absolutely nothing to do with the intent required to commit the charged crime. In order to prove the intent element of the crime of Enterprise Corruption, the State had to establish that the petitioners intentionally conducted or participated in the affairs

of an enterprise or that the petitioners intentionally acquired or maintained an interest in or control of the enterprise.[8] N.Y. Penal Law § 460.20(1) (McKinney 1989). Because the petitioners' alleged belief that they had been authorized to commit the crime was completely irrelevant to whether the petitioners intentionally participated in the affairs of the enterprise or intentionally maintained an interest in the enterprise, the trial court's refusal to give the instruction certainly did not amount to a federal constitutional violation.

For all of these reasons, the petitioners' claim concerning the trial court's intent charge provides no basis for this Court to grant a writ of *certiorari*.

POINT III

THE APPELLATE DIVISION DID NOT DISTURB THE RULE THAT AN ACCUSED IS ENTITLED TO ANY RECOGNIZED DEFENSE THAT IS SUPPORTED BY EVIDENCE.

Finally, this Court should reject the petitioners' claim that their cases should be reviewed because the Appellate Division "unsettle[d]" the fundamental precept that an accused is entitled to an instruction about any recognized defense which is supported by the evidence (Petitioners' Brief at 15-19). The Appellate Division's decision did not disturb this rule of law. On the contrary, the Appellate Division applied this rule of law.

The Appellate Division held that the petitioners were not entitled to the "reasonable belief" defense, because it was not a defense recognized in New York. *People v. Benito Iadarola*, 634 N.Y.S.2d 738 (2d Dep't 1995). Furthermore, the Appel-

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[8] Contrary to the petitioners' assertion (Petitioners' Brief at 16 n.10), Enterprise Corruption is not a specific intent crime.

late Division held that, in any event, no reasonable view of the evidence supported this defense.[9] *Id.*

While the petitioners may not agree with how the Appellate Division applied this rule to the particular facts of their case, the Appellate Division did not disregard or reject this fundamental principle. Therefore, this claim does not provide any constitutional issue for this Court to resolve.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] The New York Court of Appeals has held that, in determining whether a reasonable view of the evidence supports a defense, a state court must view the evidence in the light most favorable to the defendant. *See People v. Farnsworth*, 65 N.Y.2d 734, 492 N.Y.S.2d 12, 481 N.E.2d 552 (1985).